



State of Wisconsin  
2001 - 2002 LEGISLATURE

LRB-0718/P2

PJK:jld:jf

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

D-note

OTHER

regenerate  
↓

1     **AN ACT to repeal** 854.03 (3), 854.03 (4), 854.03 (7), 854.06 (1) (b), 854.14 (1) and  
2           861.04 (2); **to renumber** 701.115 (1), 766.62 (5) and 861.04 (1); **to renumber**  
3           **and amend** 705.04 (2), 852.01 (1) (a) 2., 854.01, 854.06 (4) (a), 854.15 (1) (e),  
4           854.20 (1), 854.20 (4) and 861.01 (3); **to amend** 700.11 (1), 701.115 (2), 701.115  
5           (3), 702.03 (1), 705.27, 766.61 (7), 767.266 (1) (b), 851.31, 851.50, 852.01 (1) (b),  
6           853.03 (2) (intro.), 853.03 (2) (a), 853.03 (2) (b), 853.03 (2) (c), 853.11 (6) (c),  
7           853.11 (6) (d), 853.32 (2) (a), 854.03 (2) (b), 854.03 (6), 854.04 (1) (a), 854.04 (5)  
8           (intro.), 854.06 (4) (b), 854.07 (3), 854.17, 854.18 (1) (a) (intro.), 854.18 (3),  
9           854.20 (2) (intro.), 854.20 (2) (b), 854.20 (3), 854.20 (5), 856.05 (5), 856.15 (1),  
10          856.17, subchapter II (title) of chapter 861 [precedes 861.018], 861.02 (title),  
11          861.02 (4), 861.02 (6), 861.02 (7) (b), 861.02 (8), 861.05 (2) (title), 861.06 (title),  
12          861.06 (2) (title), 861.07 (2) (intro.), 861.10 (1), 861.10 (2), 861.11 (2) (a) (intro.),  
13          861.11 (2) (b), 861.11 (5) (b), 861.17 (3), 861.21 (1) (a), 861.35 (1m) (intro.),  
14          861.35 (1m) (a), 861.35 (1m) (b), 861.35 (1m) (c) and 865.07 (1) (d); **to repeal**  
15          **and recreate** 853.04 (3) and 856.16; and **to create** 40.18, 701.115 (1) (a),

1 705.04 (2) (b), 705.04 (2) (d), 766.61 (7m), 766.62 (5) (bm), 852.01 (1) (a) 2. b.,  
2 854.03 (5) (g), 854.03 (5) (h), 854.03 (5) (i), 854.04 (7), 854.06 (4) (am), 854.13  
3 (2) (gm), 861.01 (4), 861.05 (1) (e), 861.05 (2m) and 861.35 (1r) of the statutes;  
4 **relating to:** miscellaneous modifications to the probate code.

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***Analysis by the Legislative Reference Bureau***

This is a preliminary draft. An analysis will be provided in a later version.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

5 **SECTION 1.** 40.18 of the statutes is created to read:

6 **40.18 Applicability of other statutes. (1) MARITAL PROPERTY RIGHTS.**  
7 Chapter 766 applies to ownership rights of a spouse in benefits provided under this  
8 chapter.

9 **(2) TRANSFERS AT DEATH.** Chapter 854 applies to transfers at death under this  
10 chapter.

11 **SECTION 2.** 700.11 (1) of the statutes is amended to read:

12 700.11 (1) If a statute or governing instrument, as defined in s. 854.01 (1),  
13 specifies that property is to be distributed to, or a future interest is to be created in,  
14 a designated individual's "heirs-," "heirs at law-," "next of kin-," "relatives," or  
15 "family," or a term that has a similar meaning, or if a class gift in favor of  
16 "descendants-," "issue," or "heirs of the body" does not specify the manner in which  
17 the property is to be distributed among the class members, the property is  
18 distributed according to s. 854.22.

19 **SECTION 3.** 701.115 (1) of the statutes is renumbered 701.115 (1) (b).

20 **SECTION 4.** 701.115 (1) (a) of the statutes is created to read:

✓ Insert 2-5 →

1 701.115 (1) (a) In <sup>✓</sup>this par. (b), "revocable trust" means a trust that the grantor,  
2 at the time of death, was alone empowered to change or revoke, by law or under the  
3 instrument creating the trust, regardless of whether the grantor then had the  
4 capacity to exercise the power.

\*\*\*\*NOTE: I changed "governing instrument" in the proposed language to  
"instrument creating the trust." I also changed "decedent" to "grantor," since that is the  
term used in newly renumbered s. 701.115 (1) (b). Is this okay?

5 SECTION 5. 701.115 (2) of the statutes is amended to read:

6 701.115 (2) Survivorship under sub. (1) (b) is governed by s. 854.03.

7 SECTION 6. 701.115 (3) of the statutes is amended to read:

8 701.115 (3) The rights of the issue of a predeceasing beneficiary under sub. (1)  
9 (b) are governed by s. 854.06.

10 SECTION 7. 702.03 (1) of the statutes is amended to read:

11 702.03 (1) Unless a contrary intention is found, if a governing instrument, as  
12 defined in s. 854.01 (1), creating a power of appointment expressly requires that the  
13 power be exercised by any type of reference to the power or its source, it is presumed  
14 that the donor's intention in requiring the reference was to prevent an inadvertent  
15 exercise of the power. Extrinsic evidence may be used to show contrary intent.

16 SECTION 8. 705.04 (2) of the statutes is renumbered 705.04 (2) (intro.) and  
17 amended to read:

18 705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original  
19 payee or the survivor of 2 or more original payees, ~~any sums remaining on deposit~~  
20 ~~belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more~~  
21 ~~die before the original payee. Payment may be made to a minor P.O.D. beneficiary,~~  
22 ~~however, only in accordance with a procedure approved in ch. 880. all of the following~~  
23 apply:

✓ Insert 3-9

1       (a) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall  
2 be are entitled to payment of the sums on deposit in accordance with such any written  
3 instructions ~~as may have been~~ that the owner filed with the financial institution, ~~and~~  
4 or, if none, to payment in equal shares. There

5       (c) If 2 or more beneficiaries succeed to ownership of the account, there is no  
6 further right of survivorship ~~in the event of the death of one of 2 or more P.O.D.~~  
7 ~~beneficiaries after their entitlement to payment has matured~~ unless the terms of the  
8 account expressly provide for survivorship or for the account's continuance as a joint  
9 account.

10       **SECTION 9.** 705.04 (2) (b) of the statutes is created to read:

11       705.04 (2) (b) If one or more P.O.D. beneficiaries has predeceased the original  
12 payee or the survivor of 2 or more original payees, the rights of the beneficiaries are  
13 determined by any written instructions that the owner filed with the financial  
14 institution or, if none, by s. 854.06.

15       **SECTION 10.** 705.04 (2) (d) of the statutes is created to read:

16       705.04 (2) (d) Payment may be made to a minor P.O.D. beneficiary only in  
17 accordance with a procedure approved in ch. 880.

18       **SECTION 11.** 705.27 of the statutes is amended to read:

19       **705.27 Ownership on death of owner.** On death of a sole owner or the last  
20 to die of multiple owners, ownership of securities registered in beneficiary form  
21 passes to the beneficiary or beneficiaries who survive all owners and to any  
22 predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death  
23 of all owners and compliance with any applicable requirements of the registering  
24 entity, a security registered in beneficiary form may be reregistered in the name of  
25 the ~~beneficiary or beneficiaries who survive the death of all owners~~ successors to the

1 ownership interest. Until division of the security after the death of all owners,  
2 multiple ~~beneficiaries surviving the death of all owners~~ successors to the ownership  
3 interest hold their interests as tenants in common. If no beneficiary or predeceased  
4 beneficiary's issue who would take under s. 854.06 (3) survives the death of all  
5 owners, the security belongs to the estate of the deceased sole owner or the estate of  
6 the last to die of multiple owners.

7 **SECTION 12.** 766.61 (7) of the statutes is amended to read:

8 766.61 (7) If a noninsured spouse predeceases an insured spouse, the marital  
9 property interest of the decedent spouse in a policy which designates the surviving  
10 spouse as the owner and insured is limited to a dollar amount equal to one-half of  
11 the marital property interest in the interpolated terminal reserve and in the unused  
12 portion of the term premium of the policy on the date of death of the deceased spouse.  
13 All other rights of the decedent spouse in the ownership interest or proceeds of the  
14 policy, other than the marital property interest described in this subsection,  
15 terminate at the decedent spouse's death. This subsection does not apply if the  
16 surviving spouse unlawfully and intentionally killed the decedent spouse, as  
17 determined under s. 854.14 (5).

\*\*\*NOTE: As I discussed with Howard Erlanger, the added sentence seems to beg  
the question of what *does* apply if this subsection does not. Is it self-evident what does  
apply, or should that be added also?

18 **SECTION 13.** 766.61 (7m) of the statutes is created to read:

19 766.61 (7m) If a noninsured spouse unlawfully and intentionally kills an  
20 insured spouse, as determined under s. 854.14 (5), the marital property interest of  
21 the surviving spouse in a policy which designates the decedent spouse as the owner  
22 and insured is limited to a dollar amount equal to one-half of the marital property  
23 interest in the interpolated terminal reserve and in the unused portion of the term

1 premium of the policy on the date of death of the deceased spouse. All other rights  
2 of the surviving spouse in the ownership interest or proceeds of the policy, other than  
3 the marital property interest described in this subsection, terminate at the decedent  
4 spouse's death.

\*\*\*\*NOTE: I changed this language somewhat from the proposed language to make  
it more parallel with sub. (7). Notice especially the use of marital property interest,  
ownership interest, and interest in the proceeds. Is this okay?

5 **SECTION 14.** 766.62 (5) of the statutes is renumbered 766.62 (5) (am).

6 **SECTION 15.** 766.62 (5) (bm) of the statutes is created to read:

7 766.62 (5) (bm) Paragraph (am) does not apply if the surviving spouse  
8 unlawfully and intentionally killed the decedent spouse, as determined under s.  
9 854.14 (5).

\*\*\*\*NOTE: Same NOTE as after s. 766.61 (7). What *does* apply if par. (am) does not?

10 **SECTION 16.** 767.266 (1) (b) of the statutes is amended to read:

11 767.266 (1) (b) That one or both spouses will make a particular disposition in  
12 a will or other governing instrument, as defined in s. 854.01 (1).

13 **SECTION 17.** 851.31 of the statutes is amended to read:

14 **851.31 Will.** "Will" includes a codicil and any document incorporated by  
15 reference in a testamentary document under s. 853.32 (1) or (2). "Will" does not  
16 include a copy, unless the copy has been proven as a will under s. 856.17, but "will"  
17 does include a properly executed duplicate original.

18 **SECTION 18.** 851.50 of the statutes is amended to read:

19 **851.50 Status of adopted persons.** The status of adopted persons for  
20 purposes of inheritance and transfers under wills or other governing instruments,  
21 as defined in s. 854.01 (1), is governed by ss. 854.20 and 854.21.

Insert 6-9

1           **SECTION 19.** 852.01 (1) (a) 2. of the statutes is renumbered 852.01 (1) (a) 2.  
2 (intro.) and amended to read:

3           852.01 (1) (a) 2. (intro.) If there are surviving issue one or more of whom are  
4 not issue of the surviving spouse, one-half of decedent's property other than marital  
5 the following property:

6           a. Marital property.

7           **SECTION 20.** 852.01 (1) (a) 2. b. of the statutes is created to read:

8           852.01 (1) (a) 2. b. Property held equally and exclusively with the surviving  
9 spouse as tenants in common.

10          **SECTION 21.** 852.01 (1) (b) of the statutes is amended to read:

11          852.01 (1) (b) To the issue, per stirpes, the share of the estate not passing to the  
12 spouse under par. (a), or the entire estate if there is no surviving spouse. ~~If there are~~  
13 ~~issue other than children, those of more remote degrees take per stirpes.~~

14          **SECTION 22.** 853.03 (2) (intro.) of the statutes is amended to read:

15          853.03 (2) (intro.) It must be signed by 2 or more witnesses, each of whom  
16 signed within a reasonable time after witnessing any of the following:

17          **SECTION 23.** 853.03 (2) (a) of the statutes is amended to read:

18          853.03 (2) (a) The signing of the will as provided under sub. (1), in the conscious  
19 presence of the witness.

20          **SECTION 24.** 853.03 (2) (b) of the statutes is amended to read:

21          853.03 (2) (b) The testator's implicit or explicit acknowledgement of the  
22 testator's signature on the will, ~~within~~ in the conscious presence of ~~each of the~~  
23 ~~witnesses~~ witness.

24          **SECTION 25.** 853.03 (2) (c) of the statutes is amended to read:

Insert 7-13

1 853.03 (2) (c) The testator's implicit or explicit acknowledgement of the will,  
2 ~~within in~~ the conscious presence of ~~each of the witnesses~~ witness.

3 SECTION 26. 853.04 (3) of the statutes is repealed and recreated to read:

4 853.04 (3) EFFECT OF AFFIDAVIT. The effect of an affidavit in substantially the  
5 form under sub. (1) or (2) is as provided in s. 856.16.

6 SECTION 27. 853.11 (6) (c) of the statutes is amended to read:

7 853.11 (6) (c) If a subsequent will that wholly or partly revoked a previous will  
8 is itself revoked by another, later will, the previous will or its revoked part remains  
9 revoked, unless it or its revoked part is revived. The previous will or its revoked part  
10 is revived to the extent that it appears from the terms of the later will, or from the  
11 testator's contemporary or subsequent declarations, that the testator intended the  
12 previous will or its revoked part to take effect.

\*\*\*NOTE: This amendment, although not requested, seemed like a good idea.

13 SECTION 28. 853.11 (6) (d) of the statutes is amended to read:

14 853.11 (6) (d) In the absence of an original valid will, ~~establishment of the~~  
15 ~~execution and validity of the revived will or part is governed by~~ may be established  
16 as provided in s. 856.17.

17 SECTION 29. 853.32 (2) (a) of the statutes is amended to read:

18 853.32 (2) (a) A reference in a will ~~executed on or after May 3, 1996,~~ to another  
19 document that lists tangible personal property not otherwise specifically disposed of  
20 in the will disposes of that property if the other document describes the property and  
21 the distributees with reasonable certainty and is signed and dated by the decedent.  
22 A document that is not dated but that fulfills all of the other requirements under this  
23 paragraph may be enforced in the discretion of the court.

✓ Inset 8-5



1           **SECTION 30.** 854.01 of the statutes is renumbered 854.01 (intro.) and amended  
2 to read:

3           **854.01 (intro.) Definition Definitions.** In this chapter, “governing:

4           **(1) “Governing instrument”** means a will; a deed; a trust instrument; an  
5 insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or  
6 similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a  
7 beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an  
8 instrument that creates or exercises a power of appointment; or any other  
9 dispositive, appointive, or nominative instrument that transfers property at death.

10          **SECTION 31.** 854.03 (2) (b) of the statutes is amended to read:

11          854.03 (2) (b) Except as provided in sub. (5), if property is transferred under  
12 a governing instrument that establishes 2 or more coowners with right of  
13 survivorship, and if it is not established that at least one of the coowners survived  
14 the others by at least 120 hours, the property is transferred to the coowners in  
15 proportion to their ownership interests.

16          **SECTION 32.** 854.03 (3) of the statutes is repealed.

17          **SECTION 33.** 854.03 (4) of the statutes is repealed.

18          **SECTION 34.** 854.03 (5) (g) of the statutes is created to read:

19          854.03 (5) (g) The governing instrument states that this statute, or one similar  
20 to it, does not apply.

21          **SECTION 35.** 854.03 (5) (h) of the statutes is created to read:

22          854.03 (5) (h) Transfers under the governing instrument are controlled by a  
23 provision regarding survivorship that is included a will or trust executed by the  
24 transferor and that is intended to apply to transfers under other governing  
25 instruments also.

1       **SECTION 36.** 854.03 (5) (i) of the statutes is created to read:

2       854.03 (5) (i) The court finds a contrary intent on the part of the person who  
3       executed the governing instrument. Extrinsic evidence may be used to construe that  
4       intent.

5       **SECTION 37.** 854.03 (6) of the statutes is amended to read:

6       854.03 (6) EVIDENTIARY STANDARD. Unless the statute or governing instrument  
7       provides otherwise, proof that an individual survived the period required under  
8       subs. (1) to (4) this section must be by clear and convincing evidence.

9       **SECTION 38.** 854.03 (7) of the statutes is repealed.

10      **SECTION 39.** 854.04 (1) (a) of the statutes is amended to read:

11      854.04 (1) (a) Except as provided in subs. (5) and (6), if a statute or a governing  
12      instrument calls for property to be distributed to the issue or descendants of a  
13      designated person “by representation,” “by right of representation,” or “per  
14      stirpes,” the property is divided into equal shares for the designated person’s  
15      surviving children of the designated person and for the designated person’s deceased  
16      children who left surviving issue. Each surviving child and each deceased child who  
17      left surviving issue are allocated one share.

18      **SECTION 40.** 854.04 (5) (intro.) of the statutes is amended to read:

19      854.04 (5) CERTAIN INDIVIDUALS DISREGARDED. (intro.) For the purposes of this  
20      section subs. (1) to (3), all of the following apply:

21      **SECTION 41.** 854.04 (7) of the statutes is created to read:

22      854.04 (7) SPECIFIC WORDS NOT NECESSARY. For the application of subs. (1) to (3)  
23      to a statute or governing instrument, it is not necessary that the specific words  
24      “issue,” “descendants,” or “issue or descendants” be used in the statute or governing  
25      instrument.

\*\*\*\*NOTE: This provision is not necessary. "Issue" is defined in s. 851.13 for chs. 851 to 882, which means that whenever the word "issue" is used in any of those chapters, it means what the definition says it means. Additionally, whenever the statutes require that a *specific* word be used, the word appears in quotes, as is the case in s. 854.04 with respect to "by representation," "per stirpes," etc. The lack of quotation marks around "issue" and "descendants" should be sufficient to indicate that the *meaning* of those words is intended in the context, not that those specific words must be used. I recommend that this subsection be taken out of the draft.

1 **SECTION 42.** 854.06 (1) (b) of the statutes is repealed.

2 **SECTION 43.** 854.06 (4) (a) of the statutes is renumbered 854.06 (4) (intro.) and  
3 amended to read:

4 854.06 (4) CONTRARY INTENT. (intro.) ~~This section~~ Subsection (3) does not apply  
5 if there any of the following applies:

6 (c) There is a finding of contrary intent of the decedent. Extrinsic evidence may  
7 be used to construe that intent.

8 **SECTION 44.** 854.06 (4) (am) of the statutes is created to read:

9 854.06 (4) (am) The governing instrument provides that a transfer to any  
10 predeceased named beneficiary lapses.

11 **SECTION 45.** 854.06 (4) (b) of the statutes is amended to read:

12 854.06 (4) (b) ~~If the~~ The governing instrument designates one or more persons,  
13 classes, or groups of people as contingent transferees, in which case those transferees  
14 take in preference to those under sub. (3). ~~But~~ Unless par. (c) applies, if none of the  
15 contingent transferees survives, sub. (3) applies to the first group in the sequence of  
16 contingent transferees that has one or more transferees specified in sub. (2) who left  
17 surviving issue.

18 **SECTION 46.** 854.07 (3) of the statutes is amended to read:

19 854.07 (3) If a governing instrument other than a will does not effectively  
20 dispose of an asset that is governed by the instrument, that asset shall be paid or  
21 distributed to the decedent's transferor's probate estate.

Insert 11-21

1       **SECTION 47.** 854.13 (2) (gm) of the statutes is created to read:

2       854.13 (2) (gm) *Disclaimer by trustee.* The trustee of a trust named as a  
3       recipient of property under a governing instrument may disclaim that property on  
4       behalf of the trust if the governing instrument authorizes disclaimer by the trustee.  
5       If the governing instrument does not authorize disclaimer by the trustee, the  
6       trustee's power to disclaim is subject to the approval of the court.

7       **SECTION 48.** 854.14 (1) of the statutes is repealed.

8       **SECTION 49.** 854.15 (1) (e) of the statutes is renumbered 854.01 (2) and  
9       amended to read:

10       854.01 (2) "Revocable", with respect to a disposition, provision, or nomination,  
11       means one under which the decedent, at the time of the divorce, annulment or similar  
12       event referred to, was alone empowered, by law or under the governing instrument,  
13       to change, revoke, or cancel the designation in favor of the former spouse or former  
14       spouse's relative, regardless of whether or not the decedent was then empowered to  
15       designate himself or herself in place of the former spouse or the former spouse's  
16       relative designee, and regardless of whether or not the decedent then had the  
17       capacity to exercise the power.

18       **SECTION 50.** 854.17 of the statutes is amended to read:

19       **854.17 Classification of property; how determined.** In chs. 851 to 882,  
20       ~~classification~~ Classification of the property of a decedent spouse and surviving  
21       spouse is determined under ch. 766.

22       **SECTION 51.** 854.18 (1) (a) (intro.) of the statutes is amended to read:

23       854.18 (1) (a) (intro.) Except as provided in sub. (3) or in connection with the  
24       ~~share of the surviving spouse who elects to take an elective share in deferred marital~~  
25       ~~property~~ deferred marital property elective share amount of a surviving spouse who

853.12 ✓  
elects under s. 861.02, ~~or~~ the share of a surviving spouse who takes under s. 853.11 ✓  
~~(2)~~ or ~~a~~ the share of a surviving child who takes under s. 853.25, shares of  
distributees abate, without any preference or priority as between real and personal  
property, in the following order:

SECTION 52. 854.18 (3) of the statutes is amended to read:

854.18 (3) If the governing instrument expresses an order of abatement, or if  
the decedent's transferor's estate plan or the ~~express or implied~~ ✓ purpose of the  
transfer would be defeated by the order of abatement under sub. (1), the shares of  
the distributees abate as necessary to give effect to the intention of the transferor.

SECTION 53. 854.20 (1) of the statutes is renumbered 854.20 (1) (a) and  
amended to read:

854.20 (1) (a) Subject to par. (b) and sub. (4) (5), a legally adopted person is  
treated as a birth child of the person's adoptive parents for purposes of intestate  
succession by, through and from the adopted person and for purposes of any statute  
conferring rights upon children, issue or relatives in connection with the law of  
intestate succession or governing instruments.

SECTION 54. 854.20 (2) (intro.) of the statutes is amended to read:

854.20 (2) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND BIRTH RELATIVES.  
(intro.) Subject to sub. (4) (5), a legally adopted person ceases to be treated as a child  
of the person's birth parents for the same purposes as under sub. (1) (a), except:

SECTION 55. 854.20 (2) (b) of the statutes is amended to read:

854.20 (2) (b) If a birth parent of a marital child dies and the other birth parent  
subsequently remarries and the child is adopted by the stepparent, the child is  
treated as the child of the deceased birth parent for purposes of inheritance through  
that parent and for purposes of any statute conferring rights upon children, issue,

as expressed, implied, or determined ✓ through  
extrinsic evidence,

1 or relatives of that parent under the law of intestate succession or governing  
2 instruments.

\*\*\*NOTE: A second "subsequently" is not needed before "adopted" because, unless the adoption occurred after the remarriage, the adoption would not be by the *stepparent*.

3 **SECTION 56.** 854.20 (3) of the statutes is amended to read:

4 854.20 (3) SEQUENTIAL ADOPTION. Subject to sub. (4) (5), if an adoptive parent  
5 dies or his or her parental rights are terminated in a legal proceeding and the  
6 adopted child is subsequently adopted by another person, the former adoptive parent  
7 is considered to be a birth parent for purposes of this section.

8 **SECTION 57.** 854.20 (4) of the statutes is renumbered 854.20 (1) (b), and 854.20  
9 (1) (b) (intro.), as renumbered, is amended to read:

10 854.20 (1) (b) *Applicability.* (intro.) ~~Subsections (1), (2) and (3) apply~~  
11 Paragraph (a) applies only if at least one of the following applies:

12 **SECTION 58.** 854.20 (5) of the statutes is amended to read:

13 854.20 (5) CONTRARY INTENT. This section does not apply if the to a transfer is  
14 made under a governing instrument ~~and~~ if there is a finding of contrary intent of the  
15 person who executed the instrument. Extrinsic evidence may be used to construe  
16 that intent.

\*\*\*NOTE: As Howard Erlanger and I discussed s. 854.20, Howard came to the conclusion that sub. (5) was intended to apply to all subsections, but that former sub. (4) was originally intended to apply only to sub. (1). Therefore, I made former sub. (4) a paragraph in sub. (1).

17 **SECTION 59.** 856.05 (5) of the statutes is amended to read:

18 856.05 (5) APPLICABILITY OF SECTION. This section applies to wills, ~~codicils~~ as  
19 defined in s. 851.31, documents incorporated by reference under s. 853.32 (1) or (2),  
20 and information needed for proof of a lost or otherwise missing will under s. 856.17.

\*\*\*NOTE: Section 856.17 applies to more than "lost" wills. Is the second amendment in this subsection okay?

Insert 14-16

1           **SECTION 60.** 856.15 (1) of the statutes is amended to read:

2           856.15 (1) **GENERALLY.** The court may grant probate of an uncontested will on  
3 the execution in open court by one of the subscribing witnesses of a sworn statement  
4 that the will was executed as required by the statutes and that the testator was of  
5 sound mind, of full age, and not acting under any restraint at the time of the  
6 execution thereof. If an uncontested will contains an attestation clause showing  
7 compliance with the requirements for execution under s. 853.03 or 853.05 or includes  
8 an affidavit in substantially the form under s. 853.04 (1) or (2), the court may grant  
9 probate without any testimony or other evidence.

10           **SECTION 61.** 856.16 of the statutes is repealed and recreated to read:

11           **856.16 Self-proved will.** (1) Unless there is proof of fraud or forgery in  
12 connection with the affidavit, if a will includes an affidavit in substantially the form  
13 under s. 853.04 (1) or (2), all of the following apply:

14           (a) The will is conclusively presumed to have been executed in compliance with  
15 s. 853.03.

16           (b) Other requirements related to the valid execution of the will are rebuttably  
17 presumed.

18           (2) A signature affixed to a self-proving affidavit under s. 853.04 that is  
19 attached to a will is considered a signature affixed to the will, if necessary to prove  
20 the due execution of the will.

21           (3) Admission of a will under s. 856.13 or 856.15 is not dependent on the  
22 existence of a valid affidavit under s. 853.04.

23           **SECTION 62.** 856.17 of the statutes is amended to read:

24           **856.17 Lost Missing will, how proved.** If any will is lost, destroyed by  
25 accident ~~or~~, destroyed without the testator's consent, or otherwise missing, the court

1 has power to take proof of the execution and validity of the will and to establish the  
2 same. The petition for the probate of the will shall set forth the provisions thereof.

\*\*\*\*NOTE: This section applies to a missing will whether it is revived or not. There is no need to mention that it applies to a missing will that is revived, because the relevant characteristic is that it is missing, not that it is revived.

3 **SECTION 63.** Subchapter II (title) of chapter 861 [precedes 861.018] of the  
4 statutes is amended to read:

5 **CHAPTER 861**

6 **SUBCHAPTER II**

7 **ELECTIVE SHARE IN**

8 **DEFERRED MARITAL PROPERTY**

9 **ELECTIVE SHARE AMOUNT**

10 **SECTION 64.** 861.01 (3) of the statutes is renumbered 766.31 (7m) and amended  
11 to read:

12 **766.31 (7m) ~~PERSONAL INJURY DAMAGES; LOST EARNINGS.~~** To the extent that  
13 marital property includes damages for loss of future income arising from a personal  
14 injury claim of the a surviving spouse, the surviving spouse is entitled to receive as  
15 individual property that portion of the award that represents an income substitute  
16 after the death of the other spouse.

\*\*\*\*NOTE: Although Howard Erlanger and I discussed making this provision s. 766.31 (7) (g), it does not fit there because it does not complete a sentence beginning with s. 766.31 (7) (intro.). Although the language conceivably could be changed to fit, it seemed reasonable to treat it in this way, especially since s. 766.31 (7p) also addresses individual property. Arguably, this provision is not even needed, since s. 766.31 (7) (f) implies that only personal injury damage amounts that are attributable to loss of income *during* marriage are marital property.

17 **SECTION 65.** 861.01 (4) of the statutes is created to read:

18 **861.01 (4) SURVIVING SPOUSE'S MARITAL PROPERTY RIGHTS IN NONPROBATE ASSETS.**  
19 Enforcement of a surviving spouse's marital property rights in nonprobate assets is  
20 governed by s. 766.70 (6).



1       **SECTION 66.** 861.02 (title) of the statutes is amended to read:

2       **861.02 (title) Deferred marital property elective share amount.**

3       **SECTION 67.** 861.02 (4) of the statutes is amended to read:

4       861.02 (4) SATISFACTION. Satisfaction of the augmented deferred marital  
5       property elective share amount is governed by ss. 861.06, 861.07, and 861.11.

6       **SECTION 68.** 861.02 (6) of the statutes is amended to read:

7       861.02 (6) WAIVER. Waiver of the deferred marital property elective share  
8       amount is governed by s. 861.10.

9       **SECTION 69.** 861.02 (7) (b) of the statutes is amended to read:

10       861.02 (7) (b) If a decedent who is not domiciled in this state owns real property  
11       in this state, the right of the surviving spouse to take an elective share in that  
12       property is governed by s. 861.20.

\*\*\*\*NOTE: Changing "elective share" to "elective share amount" does not work very well in this provision. How would you suggest amending it? Is it okay as it is?

13       **SECTION 70.** 861.02 (8) of the statutes is amended to read:

14       861.02 (8) SPECIAL PROVISION IF SURVIVING SPOUSE CAUSED DEATH OF DECEDENT.  
15       If the surviving spouse unlawfully and intentionally kills the decedent, as  
16       determined under s. 854.14 (5), the estate of the decedent shall have the right to elect  
17       no more than 50% of the augmented deferred marital property estate as determined  
18       under sub. (2), as though the surviving spouse were the decedent and the decedent  
19       were the surviving spouse. The court shall construe the provisions of ss. 861.03 to  
20       861.11 as necessary to achieve the intent of this paragraph.

\*\*\*\*NOTE: I discussed this provision with Howard Erlanger, and he suggested the change I made. The provision still strikes me as strange, however, because it does not seem to have any effect that would penalize the spouse who killed the other spouse. If the estate may elect no more than 50% of the augmented deferred marital property estate, that seems to leave at least 50% of the augmented deferred marital property estate for the surviving spouse, which is what the surviving spouse is entitled to under s. 861.02 (1), anyway, whether or not the surviving spouse killed the decedent spouse. Is the

penalty that the estate of the decedent spouse "goes first" and the surviving spouse takes what is left? (My concern with this provision is that it is drafted correctly.)

**SECTION 71.** 861.04 (1) of the statutes is renumbered 861.04.

**SECTION 72.** 861.04 (2) of the statutes is repealed.

**SECTION 73.** 861.05 (1) (e) of the statutes is created to read:

861.05 (1) (e) The deferred marital property component of any deferred employment benefit plan held by the surviving spouse that would have terminated under s. 766.62 (5) had it been marital property and had the surviving spouse been the decedent.

\*\*\*NOTE: I did not use the phrase "subject to the terminable interest rule under s. 766.62 (5)" in this paragraph. Is the language okay? Don't you also need to specify that the surviving spouse is treated as the nonemployee spouse under s. 766.62 (5)? It gets very confusing when one party is treated as if he or she were the other party. Is that treatment under the statute we are dealing with (861.05 (1)) or under the statute referred to (766.62 (5))? Isn't it possible to state s. 861.05 (1) (e) more directly?

**SECTION 74.** 861.05 (2) (title) of the statutes is amended to read:

861.05 (2) (title) VALUATION OF DECEDENT'S PROPERTY AND TRANSFERS.

**SECTION 75.** 861.05 (2m) of the statutes is created to read:

861.05 (2m) VALUATION OF SURVIVING SPOUSE'S PROPERTY AND TRANSFERS. The surviving spouse's property included in the augmented deferred marital property estate under s. 861.04 is valued in the same manner as the decedent spouse's property included in the augmented deferred marital property estate is valued under sub. (2), subject to the following:

(a) The surviving spouse shall be treated as having died after the decedent on the date of the decedent's death.

(b) Life insurance on the surviving spouse's life shall be valued as though the surviving spouse were living and the rule of s. 766.61 (7) applied.

\*\*\*NOTE: Paragraph (b) appears to give the life insurance the value of the decedent's (decedent under both this section and s. 766.61 (7)) marital property interest in the insurance under s. 766.61 (7). Is this what you want? If so, it might be better to

simply state that directly. (It just sounds funny to say that the surviving spouse will be treated as if he or she were living.)

1       **SECTION 76.** 861.06 (title) of the statutes is amended to read:

2       **861.06 (title) Satisfaction of deferred marital property elective share**  
3       **amount.**

4       **SECTION 77.** 861.06 (2) (title) of the statutes is amended to read:

5       861.06 (2) (title) INITIAL SATISFACTION OF DEFERRED MARITAL PROPERTY ELECTIVE

6       SHARE AMOUNT.

7       **SECTION 78.** 861.07 (2) (intro.) of the statutes is amended to read:

8       861.07 (2) PERSONS LIABLE. (intro.) The following persons are liable to make  
9       a prorated contribution toward satisfaction of the surviving spouse's deferred  
10       marital property elective share amount:

11       **SECTION 79.** 861.10 (1) of the statutes is amended to read:

12       861.10 (1) RIGHT TO ELECT MAY BE WAIVED. The right to elect a deferred marital  
13       property elective share amount may be waived by the surviving spouse in whole or  
14       in part. The waiver may take place before or after marriage. The waiver ~~shall~~ may  
15       be contained in a marital property agreement that is enforceable under s. 766.58 or  
16       in a signed document filed with a court described in s. 861.08 (1) (a) after the  
17       decedent's death.

\*\*\*\*NOTE: Is the "shall" to "may" change above correct? If not, "shall" should be changed to "must."

18       **SECTION 80.** 861.10 (2) of the statutes is amended to read:

19       861.10 (2) WAIVER OF "ALL RIGHTS". Unless the waiver provides otherwise, a  
20       waiver of "all rights", or equivalent language, in the property or estate of a present  
21       or prospective spouse, or in a complete property settlement entered into because of

Insert 19-6

1 separation or divorce, is a waiver of all rights in the deferred marital property  
2 elective share amount.

3 **SECTION 81.** 861.11 (2) (a) (intro.) of the statutes is amended to read:

4 861.11 (2) (a) (intro.) Upon a beneficiary's request for payment, a payer or other  
5 3rd party who has received satisfactory proof of the decedent's death and who has not  
6 received written notice that the surviving spouse or his or her representative intends  
7 to file a petition for the deferred marital property elective share amount or that a  
8 petition for the election has been filed is not liable for any of the following:

9 **SECTION 82.** 861.11 (2) (b) of the statutes is amended to read:

10 861.11 (2) (b) A payer or other 3rd party is liable for payments made or other  
11 actions taken after receipt of written notice of the intent to file a petition for the  
12 elective share amount or written notice that a petition for the elective share amount  
13 has been filed.

14 **SECTION 83.** 861.11 (5) (b) of the statutes is amended to read:

15 861.11 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded  
16 a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a  
17 financial institution is not liable for having transferred an account included in the  
18 augmented deferred marital property estate under s. 861.03 to a beneficiary  
19 designated in a governing instrument, or for having taken any other action in  
20 reliance on the beneficiary's apparent entitlement under the terms of a governing  
21 instrument, regardless of whether the financial institution received written notice  
22 of an intent to file, or the filing of, a petition for the deferred marital property elective  
23 share amount.

24 **SECTION 84.** 861.17 (3) of the statutes is amended to read:

1           861.17 (3) If the spouse is successful in an action to reach fraudulent property  
2 arrangements, recovery is limited to the share amount the spouse would receive  
3 under ch. 852 and this chapter. Other rules of this chapter apply so far as possible.  
4 Recovery forfeits any power of appointment which the surviving spouse possesses  
5 over the remaining portion of the fraudulently arranged property, except a special  
6 power.

7           **SECTION 85.** 861.21 (1) (a) of the statutes is amended to read:

8           861.21 (1) (a) "Governing instrument" has the meaning given in s. 854.01 (1).

9           **SECTION 86.** 861.35 (1m) (intro.) of the statutes is amended to read:

10           861.35 (1m) (intro.) If the decedent is survived by a spouse or by children, the  
11 court may, subject to sub. (1r), order an allowance for the support and education of  
12 each dependent child and for the support of the spouse. This allowance may be made  
13 whether the estate is testate or intestate. If the decedent is not survived by a spouse,  
14 the court also may, subject to sub. (1r), allot directly to any of the dependent children  
15 household furniture, furnishings, and appliances. No allowance may be made under  
16 this section if any of the following ~~apply~~ applies:

17           **SECTION 87.** 861.35 (1m) (a) of the statutes is amended to read:

18           861.35 (1m) (a) The decedent has amply provided for each dependent child and  
19 for the spouse by the ~~terms of his or her will and the estate is sufficient to carry out~~  
20 ~~the terms after payment of all debts and expenses~~ transfer of probate or nonprobate  
21 assets, or support and education have been provided for by any other means.

22           **SECTION 88.** 861.35 (1m) (b) of the statutes is amended to read:

23           861.35 (1m) (b) In the case of dependent children, ~~if~~ the surviving spouse is  
24 legally responsible for support and education and has ample means to provide them  
25 in addition to his or her own support.

✓ Insert 21-8

**SECTION 89.** 861.35 (1m) (c) of the statutes is amended to read:

861.35 **(1m)** (c) In the case of the surviving spouse, if he or she has ample means to provide for his or her support.

**SECTION 90.** 861.35 (1r) of the statutes is created to read:

861.35 (1r) The court may order an allowance under sub. (1m) for an adult child of the decedent who was being supported by the decedent at the time of the decedent's death only if the court finds, under the facts and circumstances, that the decedent intended to continue support of the adult child after the decedent's death. Extrinsic evidence may be used to determine that intent, but a decedent's signed statement of intent that support not be awarded to an adult child is binding on the court.

**SECTION 91.** 865.07 (1) (d) of the statutes is amended to read:

865.07 (1) (d) The decedent died intestate or testate, and, if testate, whether the original will is in the possession of the court or accompanies the application and, contains an attestation clause showing compliance with the requirements of execution under s. 853.03 or 853.05 or includes an affidavit in substantially the form under s. 853.04 (1) or (2), and does not expressly prohibit informal administration;

**(END)**

Insert 22-16

D-Note

2001-2002 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0718/P2ins  
PJK:jld:jf

INSERT 2-5

1           **SECTION 1.** 40.02 (8) (a) 2.✓ of the statutes is amended to read:

2           40.02 (8) (a) 2. In the absence of a written designation of beneficiary, or if all

3           beneficiaries so designated die before filing with the department an application for

4           any death benefit payable, the person determined in the following sequence: group

5           1, widow or widower; group 2, ~~children if at least one child survives the participant,~~

6           ~~employee or annuitant, in which event the share of any deceased child shall be~~

7           ~~payable to the surviving spouse of the child or to the surviving children of the child~~

8           ~~if there is no spouse, or otherwise to the other eligible children in this group; group~~

9           ~~3, grandchild; group 4, parent; group 5, brother and sister~~ issue, as defined in s.

10          851.13,✓ per stirpes, as described in s. 854.04 (1). No payment may be made to a person

11          included in any group 2.✓ if there is a living person in any preceding group 1.✓

History: 1981 c. 96, 187, 250, 274, 386; 1983 a. 9, 27; 1983 a. 81 s. 11; 1983 a. 83 s. 20; 1983 a. 106, 140; 1983 a. 141 ss. 1 to 3, 20; 1983 a. 191 ss. 1, 6; 1983 a. 192 s. 304; 1983 a. 255 s. 6; 1983 a. 275, 290, 368; 1983 a. 435 s. 7; 1985 a. 29, 225; 1985 a. 332 ss. 52, 251 (1); 1987 a. 27, 62, 83, 107, 309, 340, 356, 363, 372, 399; 1987 a. 403 ss. 43 to 45, 256; 1989 a. 13, 14, 31; 1989 a. 56 s. 259; 1989 a. 166, 182, 189, 218, 230, 240, 323, 327, 336, 355, 357, 359; 1991 a. 32, 39, 113, 152, 229, 269, 315; 1993 a. 16, 263, 383, 490, 491; 1995 a. 27, ss. 1946 to 1953, 9130 (4); 1995 a. 81, 88, 89, 216, 240, 302, 381, 417; 1997 a. 3, 27, 39, 69, 110, 162, 237, 238; 1999 a. 9, 11, 42, 63, 65, 83.

(END OF INSERT 2-5)

INSERT 3-9

12           **SECTION 2.** 701.19 (10)✓ of the statutes is repealed and recreated to read:

13           701.19 (10) RESTRICTION ON EXERCISE OF POWERS. (a) Except as provided in pars.

14           (c) and (d),✓ a person may not exercise any of the following powers conferred upon the

15           person in his or her capacity as trustee:

16           1. The power to make discretionary distributions of trust principal✓ or income

17           if the distributions are to himself or herself or for the discharge of his or her legal

18           obligations.

19           2. The power to make discretionary allocations of receipts or expenses as

20           between principal and income if ~~ten~~ allocations are in his or her favor.

(b) If a power under par. (a) is conferred upon more than one person as trustee, a person who is not disqualified to act under par. (a) may exercise the power for the benefit of the person who is disqualified to act, unless the creating instrument expressly provides otherwise. A special trustee appointed by a court may exercise a power under par. (a) for the benefit of the person if there is no other trustee qualified to exercise the power.

(c) Paragraph (a) does not apply if the person is also the settlor of the trust, and the trust may be revoked or amended by the settlor.

(d) Paragraph (a) does not apply with respect to a power under par. (a) 1. or 2. if any of the following applies:

1. The terms of the creating instrument specifically limit the scope of the power to expenditures and distributions of income or principal on the basis of an ascertainable standard relating to the person's health, maintenance, support, or education such that the person would not be subject to tax under section 2041 or 2514 of the Internal Revenue Code as a result of the distribution or allocation.

2. The person is the spouse, widow, or widower of the settlor of the trust, and a marital deduction has been allowed for federal gift or estate tax purposes with respect to the trust property that is subject to the distribution or allocation.

3. The creating instrument negates the application of par. (a) with respect to the power.

**SECTION 3.** 701.24 (title) of the statutes is amended to read:

**701.24 (title) Applicability of ss. 701.01 to 701.23.**

History: 1971 c. 66; 1977 c. 309.

**SECTION 4.** 701.24 of the statutes is renumbered 701.24 (1) and amended to read:



1           701.24 (1) Except as otherwise provided in sub. (2) and s. 701.19 (9) (a) and (10),  
2       ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust  
3       created after such date, and shall govern trustees acting under such trusts. If  
4       application of any provision of ss. 701.01 to 701.23 to a trust in existence on August  
5       1, 1971, is unconstitutional, it shall not affect application of the provision to a trust  
6       created after that date.

History: 1971 c. 66; 1977 c. 309.

7       **SECTION 5.** 701.24 (2) of the statutes is created to read:

8           701.24 (2) Section 701.19 (10) is applicable to a trust existing on the effective  
9       date of this subsection .... [revisor inserts date], as well as a trust created after that  
10      date, and shall govern trustees acting under such trusts. If application of any  
11      provision of s. 701.19 (10) to a trust in existence on the effective date of this  
12      subsection .... [revisor inserts date], is unconstitutional, it shall not affect application  
13      of the provision to a trust created after that date.

\*\*\*\*NOTE: Do you want the change to s. 701.19 (10) to apply to a trust existing on  
the effective date?

(END OF INSERT 3-9)

**INSERT 6-9**

14       **SECTION 6.** 766.61 (7) of the statutes is amended to read:

15       766.61 (7) If Except as provided in s. 854.14 (3m) (b) 2., if a noninsured spouse  
16      predeceases an insured spouse, the marital property interest of the decedent spouse  
17      in a policy which designates the surviving spouse as the owner and insured is limited  
18      to a dollar amount equal to one-half of the marital property interest in the  
19      interpolated terminal reserve and in the unused portion of the term premium of the  
20      policy on the date of death of the deceased spouse. All other rights of the decedent  
21      spouse in the ownership interest or proceeds of the policy, other than the marital

property interest described in this subsection, terminate at the decedent spouse's death.

History: 1983 a. 186; 1985 a. 37; 1987 a. 393; 1991 a. 301; 1997 a. 188.

**SECTION 7.** 766.62 (5) (intro.) of the statutes is amended to read:

766.62 (5) (intro.) If Except as provided in s. 854.14 (3m) (c), if the nonemployee spouse predeceases the employee spouse, the marital property interest of the nonemployee spouse in all of the following terminates at the death of the nonemployee spouse:

History: 1983 a. 186; 1985 a. 37 ss. 128, 187; 1987 a. 393; 1991 a. 301; 1993 a. 160.

(END OF INSERT 6-9)

**INSERT 7-13**

**SECTION 8.** 852.12 of the statutes is amended to read:

**852.12 Debts to decedent.** If an heir owes a debt to the decedent, the treatment of that debt shall be charged against the intestate share of the debtor, regardless of whether the debt has been discharged in bankruptcy. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue is governed by s. 854.12.

History: 1997 a. 188.

(END OF INSERT 7-13)

**INSERT 8-5**

**SECTION 9.** 853.11 (2) of the statutes is renumbered 853.12, and 853.12 (1), (2) (intro.), (b) and (c), (3) (intro.) and (4) (intro.) and (b), as renumbered, are amended to read:

**853.12 (1) ENTITLEMENT OF SURVIVING SPOUSE.** Subject to ~~par. (e)~~ sub. (3), if the testator married the surviving spouse after the testator executed his or her will, the surviving spouse is entitled to a share of the probate estate.

(2) VALUE OF SHARE. (intro.)<sup>✓</sup> The value of the share under ~~par. (a)~~ sub. (1)<sup>✓</sup> is the value of the share that the surviving spouse would have received had the testator died with an intestate estate equal to the value of the net estate of the decedent testator less the value of all of the following:

(5) (b) All devises to or for the benefit of the issue of a child described in subd. 1.<sup>↓</sup>

(6) par. (a)<sup>↓</sup>

(c) All devises that pass under s. 854.06, 854.07, 854.21<sup>✓</sup>, or 854.22 to or for the benefit of children described in subd. 1. par. (a)<sup>✓</sup> or issue of those children.

(3) EXCEPTIONS. (intro.) ~~Paragraph (a)~~ Subsection (1)<sup>✓</sup> does not apply if any of the following applies:

History: 1981 c. 228; 1983 a. 186; 1987 a. 222; 1993 a. 486; 1997 a. 188.

(4) PRIORITY AND ABATEMENT. (intro.) In satisfying the share provided by this subsection<sup>✓</sup> section:

History: 1981 c. 228; 1983 a. 186; 1987 a. 222; 1993 a. 486; 1997 a. 188.

(b) Devises other than those described in ~~par. (b) 1. to 3.~~ sub. (2) (a) to (c)<sup>✓</sup> abate as provided under s. 854.18.

History: 1981 c. 228; 1983 a. 186; 1987 a. 222; 1993 a. 486; 1997 a. 188.

\*\*\*\*NOTE: I did not create a cross-reference in s. 853.11 to new s. 853.12<sup>✓</sup>. It really should not be necessary to point a reader to the next consecutive section, especially if that section deals with a different issue, which is the reason s. 853.12<sup>✓</sup> was carved out of s. 853.11.

SECTION 10. 853.11 (3)<sup>✓</sup> of the statutes is amended to read:

853.11 (3) ~~FORMER SPOUSE~~ REVOCATION BY DIVORCE<sup>✓</sup>. ~~The effect of a A transfer~~ under a will to a former spouse is governed by s. 854.15.

History: 1981 c. 228; 1983 a. 186; 1987 a. 222; 1993 a. 486; 1997 a. 188.

\*\*\*\*NOTE: I did not move s. 853.11 (3) to new s. 853.12. This subsection appears legitimately to belong with the revocation provisions, in the same way that subsection (3m)<sup>✓</sup> does.

(END OF INSERT 8-5)

INSERT 11-1

1           SECTION 11. 854.05 (5) of the statutes is amended to read:

2           854.05 (5) CONTRARY INTENT. This section does not apply to the extent that a  
3           governing instrument, either expressly or as construed from extrinsic evidence,  
4           provides otherwise if there is a finding of contrary intent of the person who executed  
5           the governing instrument. Extrinsic evidence may be used to construe that intent.  
6           A general directive to pay debts does not give rise to a presumption of exoneration.

History: 1997 a. 188.

(END OF INSERT 11-1)

INSERT 11-21

7           SECTION 12. 854.12 of the statutes is created to read:

8           **854.12 Debt to transferor.** (1) If an heir owes a debt to the decedent, the  
9           amount of the indebtedness if due, or the present worth of the indebtedness if not  
10          due, shall be charged against the intestate share of the debtor, regardless of whether  
11          the debt has been discharged in bankruptcy. If the debtor fails to survive the  
12          decedent, the debt shall not be taken into account in computing the intestate shares  
13          of the debtor's issue.

14          (2) (a) Subject to par. (c), if a transferee under a governing instrument survives  
15          the transferor and is indebted to the transferor, the amount of the indebtedness if  
16          due, or the present worth of the indebtedness if not due, shall be treated as an offset  
17          against property to which the transferee is entitled.

18          (b) Subject to par. (c), in contesting an offset under par. (a), the transferee shall  
19          have the benefit of any defense that would be available to the transferee in a direct  
20          proceeding by the personal representative for the recovery of the debt, except that  
21          the transferee may not defend on the basis that the debt was discharged in

1 bankruptcy unless that discharge occurred before the execution of the governing  
2 instrument.

3 (c) Paragraph (a) or (b) <sup>✓</sup> does not apply if there is a finding of contrary intent of  
4 the person who executed the governing instrument. Extrinsic evidence may be used  
5 to construe that intent.

\*\*\*\*NOTE: I did not make par. (b) or (c) above apply to par. (a), <sup>✓</sup> because both pars.  
(b) and (c) concern the governing instrument.

(END OF INSERT 11-21)

INSERT 12-6

6 SECTION 13. 854.13 (7) (a) <sup>✓</sup> of the statutes is amended to read:

7 854.13 (7) (a) Unless the transferor of the property or donee of the power has  
8 otherwise provided <sup>✓</sup> otherwise in a governing instrument, either expressly or as  
9 construed from extrinsic evidence, the disclaimed property devolves as if the  
10 disclaimant had died before the decedent or before the effective date of the transfer  
11 under the governing instrument. If the disclaimant is an appointee under a power  
12 exercised by a governing instrument, the disclaimed property devolves as if the  
13 disclaimant had died before the effective date of the exercise of the power. If the  
14 disclaimant is a taker in default under a power created by a governing instrument,  
15 the disclaimed property devolves as if the disclaimant had predeceased the donee of  
16 the power. This paragraph is subject to subs. (8), (9), <sup>✓</sup> and (10).

History: 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; <sup>✓</sup> 1995 a. 360; 1997 a. 188 ss. 22 to 59, 175; Stats. 1997 s. 854.13.

17 SECTION 14. 854.13 (8) of the statutes is amended to read:

18 854.13 (8) DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. ~~At~~ <sup>↓</sup> Unless the  
19 decedent provided otherwise in a governing instrument, either expressly or as  
20 construed from extrinsic evidence, <sup>✓</sup> a disclaimed interest in a joint tenancy passes to  
21 the decedent's probate estate.

History: 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; 1995 a. 360; 1997 a. 188 ss. 22 to 59, 175; Stats. 1997 s. 854.13.

SECTION 15. 854.13 (9) of the statutes is amended to read:

854.13 (9) DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL PROPERTY. ~~Unless the decedent provided otherwise in a governing instrument,~~ either expressly or as construed from extrinsic evidence, a disclaimed interest in survivorship marital property passes to the decedent's probate estate.

History: 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; 1995 a. 360; 1997 a. 188 ss. 22 to 59, 175; Stats. 1997 s. 854.13.

SECTION 16. 854.13 (10) of the statutes is amended to read:

854.13 (10) DEVOLUTION OF DISCLAIMED FUTURE INTEREST. Unless the instrument creating the future interest manifests a contrary intent transferor of the future interest or donee of the power under which the future interest was created provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a future interest limited to take effect in possession or enjoyment after the termination of the interest which ~~that~~ is disclaimed takes effect as if the disclaimant had died before the effective date of the governing instrument or, if the disclaimant is an appointee under a power exercised by a governing instrument, as if the disclaimant had died before the effective date of the exercise of the power.

History: 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; 1995 a. 360; 1997 a. 188 ss. 22 to 59, 175; Stats. 1997 s. 854.13.

(END OF INSERT 12-6)

INSERT 12-7

SECTION 17. 854.14 (3m) of the statutes is created to read:

854.14 (3m) EFFECT IF DEATH CAUSED BY SPOUSE. (a) Definitions. In this subsection:

1. "Owner" means a person appearing on the records of the policy issuer as the person having the ownership interest, or means the insured if no person other than the insured appears on those records as a person having that interest. In the case of group insurance, the term means the holder of each individual certificate of

coverage under the group plan and does not include the person who contracted with the policy issuer on behalf of the group, regardless of whether that person is listed as the owner on the contract.

2. "Ownership interest" means the rights of an owner under a policy.

3. "Policy" means an insurance policy insuring the life of a spouse and providing for payment of death benefits at the spouse's death.

4. "Proceeds" means the death benefit from a policy and all other economic benefits from it, whether they accrue or become payable as a result of the death of an insured person or upon the occurrence or nonoccurrence of another event.

(b) Life insurance. 1. *Except as provided in sub. (6), if* a noninsured spouse unlawfully and intentionally kills an insured spouse, the surviving spouse's ownership interest in a policy that designates the decedent spouse as the owner and insured, or in the proceeds of such a policy, is limited to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the decedent spouse. All other rights of the surviving spouse in the ownership interest or proceeds of the policy, other than the marital property interest described in this subsection, terminate at the decedent spouse's death. *and except as provided in sub. (6)*

2. Notwithstanding s. 766.61 (7), if an insured spouse unlawfully and intentionally kills a noninsured spouse, the ownership interest at death of the decedent spouse in any policy with a marital property component that designates the surviving spouse as the owner and insured is equal to one-half of the portion of the policy that was marital property immediately before the death of the decedent spouse.

and except as provided in  
sub. (6)

(c) *Deferred employment benefits.* Notwithstanding s. 766.62 (5), if the employee spouse unlawfully and intentionally kills the nonemployee spouse, the ownership interest at death of the decedent spouse in any deferred employment benefit, or in assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan, that has a marital property component and that is attributable to the employment of the surviving spouse is equal to one-half of the portion of the benefit or assets that was marital property immediately before the death of the decedent spouse.

\*\*\*\*NOTE: I included assets in an IRA that are traceable to the rollover of a deferred employment benefit plan. Okay?

(END OF INSERT 12-7)

Insert 12-7A is the last page of these inserts

INSERT 14-16

**SECTION 18.** 854.21 (1) (a) (intro.) of the statutes is amended to read:

854.21 (1) (a) (intro.) Except as provided in ~~par. (b)~~ or sub. (7), a gift of property by a governing instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees, or the like includes a person adopted by a person whose birth child would be a member of the class, and issue of the adopted person, if the conditions for membership in the class are otherwise satisfied and any of the following applies:

History: 1997 a. 188.

**SECTION 19.** 854.21 (1) (b) of the statutes is amended to read:

854.21 (1) (b) Except as provided in sub. (7), a gift ~~under par. (a)~~ of property by a governing instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees, or the like excludes a birth child and his or her issue otherwise within



1 the class if the birth child has been adopted and would cease to be treated as a child  
2 of the birth parent under s. 854.20 (2).

History: 1997 a. 188.

(END OF INSERT 14-16)

INSERT 18-1

3 SECTION 20. 861.02 (8) of the statutes is renumbered 854.14 (3m) (d) and  
4 amended to read:

5 854.14 (3m) (d) ~~Special provision if surviving spouse caused death of decedent~~  
6 Deferred marital property. ~~If the surviving spouse unlawfully and intentionally kills~~  
7 ~~the decedent, as determined under s. 854.14 (5) spouse,~~ <sup>Except as provided in sub. (6), if</sup> the estate of the decedent  
8 shall have the right to elect no more than 50% of the augmented deferred marital  
9 property estate as determined under sub. (2) s. 861.02 (2), as though the decedent  
10 spouse were the survivor and the surviving spouse were the decedent. The court  
11 shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent  
12 of this paragraph.

History: 1983 a. 186; 1985 a. 37 ss. 144, 145; Stats. 1985 s. 861.02; 1987 a. 393; 1991 a. 224, 301, 315; 1993 a. 213; 1997 a. 188.

13 SECTION 21. 861.02 (8m) of the statutes is created to read:

14 861.02 (8m) EFFECT IF DEATH CAUSED BY SPOUSE. Section 854.14 (3m) (d) applies  
15 to election of deferred marital property if the decedent's surviving spouse unlawfully  
16 and intentionally killed the decedent.

(END OF INSERT 18-1)

INSERT 19-6

17 SECTION 22. 861.06 (2) (b) (intro.) of the statutes is amended to read:

1           861.06 (2) (b) (intro.) All marital, individual, deferred marital<sup>✓</sup> or deferred  
2 individual property, transferred to the surviving spouse, including any beneficial  
3 interest in property transferred in trust:

History: 1997 a. 188.

4           **SECTION 23.** 861.06 (2) (b) 4. a. <sup>✓</sup> of the statutes is amended to read:

5           861.06 (2) (b) 4. a. The first \$5,000 of the value of the gifts from the decedent  
6 to the surviving spouse each year. <sup>✓</sup> Each gift shall be valued as of the date of the gift.

History: 1997 a. 188.

(END OF INSERT 19-6)

**INSERT 21-8**

7           **SECTION 24.** 861.31 (4) (a) <sup>✓</sup> of the statutes is amended to read:

8           861.31 (4) (a) Any entitlement of the surviving spouse under s. <sup>✓</sup> 853.11 (2)  
9 853.12.

History: 1971 c. 40; 1991 a. 301; 1997 a. 188.

(END OF INSERT 21-8)

**INSERT 22-10**

10          **SECTION 25.** 861.35 (4) (a) <sup>✓</sup> of the statutes is amended to read:

11          861.35 (4) (a) Any entitlement of the surviving spouse under s. <sup>✓</sup> 853.11 (2)  
12 853.12.<sup>✓</sup>

History: 1971 c. 213 s. 5; 1983 a. 186; 1991 a. 301; 1997 a. 188.

13          **SECTION 26.** 863.15 of the statutes is amended to read:

14          **863.15 Right of retention Debts to estate.** <sup>✓</sup> <sup>plain</sup> ~~When~~ If a distributee of an estate  
15 is indebted to the estate, the amount of the indebtedness if due, <sup>OK</sup> or the present worth  
16 of the indebtedness, if not due, shall be treated as an offset by the personal  
17 representative against property of the estate to which the distributee is entitled. In  
18 ~~contesting the offset the distributee shall have the benefit of any defense which~~

1 ~~would be available to the distributee in a direct proceeding by the personal~~  
2 ~~representative for the recovery~~ treatment of the debt is governed by s. 854.12. ✓

History: 1993 a. 486.

(END OF INSERT 22-10)

INSERT 22-16

3 **SECTION 27. Initial applicability.**

4 (1) The treatment of section 40.02 (8) (a) 2. ✓ of the statutes first applies to deaths  
5 occurring on the first day of the <sup>10<sup>th</sup></sup> ~~tenth~~ month beginning after the effective date of this  
6 subsection. ✓

(END OF INSERT 22-16)

**2001-2002 DRAFTING INSERT**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0718/P2ins  
PJK:jld:jf

**INSERT 12-7A**

1           **SECTION 1.** 854.14 (5) (a) <sup>✓</sup> of the statutes is amended to read:

2           854.14 (5) (a) A final judgment establishing criminal accountability for the  
3           unlawful and intentional killing of the decedent conclusively establishes the  
4           convicted individual as the decedent's killer for purposes of this section <sup>✓</sup> and ~~s. 861.02~~  
5           (8).

6           History: 1997 a. 188.

6           **SECTION 2.** 854.14 (5) (b) <sup>✓</sup> of the statutes is amended to read:

7           854.14 (5) (b) A final adjudication of delinquency on the basis of an unlawful  
8           and intentional killing of the decedent conclusively establishes the adjudicated  
9           individual as the decedent's killer for purposes of this section <sup>✓</sup> and ~~s. 861.02 (8)~~.

10          History: 1997 a. 188.

10          **SECTION 3.** 854.14 (5) (c) <sup>✓</sup> of the statutes is amended to read:

11          854.14 (5) (c) In the absence of a judgment establishing criminal accountability  
12          or an adjudication of delinquency, the court, upon the petition of an interested  
13          person, shall determine whether, under the preponderance of evidence standard, the  
14          killing was unlawful and intentional for purposes of this section <sup>✓</sup> and ~~s. 861.02 (8)~~.

History: 1997 a. 188.

**(END OF INSERT 12-7A)**